# UNIFORM ELECTRONIC WILLS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
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*WITH PREFATORY NOTE AND COMMENTS*



November 20, 2019

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## Prefatory Note

**Electronic Wills Under Existing Statutes.** People increasingly turn to electronic tools to accomplish life's tasks, including legal tasks. They use computers, tablets, or smartphones to execute electronically a variety of estate planning documents, including pay-on-death and transfer-on-death beneficiary designations and powers of attorney. Some people assume that they will be able to execute all their estate planning documents electronically, and they prefer to do so for efficiency, cost savings, or other reasons. Indeed, a few cases involving wills executed on electronic devices have already arisen.

An early case involved a testator's signature typed in a word processing document, which was then printed in hard copy. In *Taylor v. Holt*, 134 S.W.3d 830 (Tenn. 2003), the testator typed his signature in a cursive font at the end of the electronic text of his will and then printed the will. Two witnesses watched him type the signature on the will, and then they signed the printed copy of the will. The court had no trouble concluding that the typed signature qualified as the testator's signature. The statute defined signature to include a "symbol or methodology executed or adopted by a party with intention to authenticate a writing . . . ." TENN. CODE ANN. § 1-3-105(27) (1999). In *Taylor* the will was not attested or stored electronically, but the case illustrates a situation in which the substitution of electronic tools for traditional pen and paper can lead to litigation.

In a more recent Ohio case, *In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013), the testator dictated a will to his brother, who wrote the will with a stylus on a Samsung Galaxy Tablet. The testator then signed the will on the tablet, using the stylus, as did the two witnesses. The probate court had to decide whether the electronic writing on the tablet met the statutory requirement that a will be "in writing." The court concluded that it did and admitted the will to probate. In *Castro*, the testator and all witnesses were in the same room and signed using a stylus rather than typing a signature. The Uniform Electronic Wills Act ("the E-Wills Act") gives effect to such a will and clarifies that the will meets the writing requirement. In *Castro*, the testator and witnesses had not signed an affidavit, so the will was not self-proving. Under the E-Wills Act, if a notary is present with the testator and witnesses, the will can be made self-proving. An alternative provided under the E-Wills Act allows a notary present electronically to prepare the self-proving affidavit.

An even more recent case illustrates what may be anticipated to be the most common electronic will scenario: that of a will prepared without witnesses and stored electronically. Shortly before his death by suicide, Duane Horton (a 21-year-old man) handwrote a journal entry stating that a document titled "Last Note" was on his phone. The journal entry provided instructions for accessing the note, and he left the journal and phone in his room. The Last Note included apologies and personal comments relating to his suicide as well as directions relating to his property. Mr. Horton typed his name at the end of the document. After considering the text of the document and the circumstances surrounding Mr. Horton's death, the probate and appeals court applied Michigan's harmless error statute and concluded that the note was a document that could be treated as executed in compliance with Michigan's requirements for execution of a will.

*In re Estate of Horton*, 925 N.W. 2d 207 (Mich. 2018). Under the E-Wills Act, the note would be considered a will only if the state had adopted the harmless error provision of Section 6 and a court determined that the decedent intended the electronic writing to be the decedent's will and therefore excused the lack of witnesses.

Although existing statutes might validate wills like the ones in *Castro* and *Taylor*, litigation may be necessary to resolve the question of validity. Further, the results will be haphazard if no clear policy exists and given statutory variation across the states. States that have adopted the harmless error rule for will execution could use that rule to validate an electronic will, as the court did in *In re Horton*. However, harmless error requires a judicial decision based on clear and convincing evidence, so relying on harmless error could increase costs for parties and courts. Further, in the United States, only 11 states have enacted harmless error statutes. In a state that has not adopted a harmless error statute, a court might adopt the doctrine judicially, as endorsed by RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.2 (1999), or might use the doctrine of substantial compliance to validate a will that did not comply with the execution formalities. *See, e.g.*, *In re Will of Ranney,* 589 A.2d 1339 (N.J. 1991) (adopting substantial compliance prior to New Jersey's adoption of a harmless error statute). However, courts are reluctant to adopt exceptions to statutory execution formalities. *See, e.g.*, *Litevich v. Probate Court, Dist. Of West Haven,* 2013 WL 2945055 (Sup. Ct. Conn. 2013); *Davis v. Davis-Henriques*, 135 A.3d 1247 (Conn. App. 2016) (rejecting arguments that the court apply harmless error). As more people turn to electronic devices to conduct personal business, statutory guidance on execution of electronic wills can streamline the process of validating those wills.

**Goals of the E-Wills Act.** Estate planning lawyers, notaries, and software providers are among those interested in electronic wills. As of 2019, state legislatures in Arizona, California, the District of Columbia, Florida, Indiana, New Hampshire, Texas, and Virginia have considered bills authorizing electronic execution of wills. Arizona, Indiana, and Florida have adopted new electronic wills legislation, and Nevada has revised its existing electronic wills statute.

Given the flurry of activity around this issue, the Uniform Law Commission became concerned that inconsistency would follow if states modified their will execution statutes without uniformity. The mobile population in the United States makes interstate recognition of wills important, and if state law on this question is not uniform, that recognition will be a significant issue. The E-Wills Act seeks:

- To allow a testator to execute a will electronically, while maintaining the safeguards wills law provides for wills executed on something tangible (usually paper);
- To create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will; and
- To develop a process that would not enshrine a particular business model in the statutes.

The E-Wills Act seeks to preserve the four functions served by will formalities, as described in John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) (citing Lon Fuller, *Consideration and Form,* 41 COL. L. REV. 799 (1941), which discussed the channeling function in connection with contract law, and Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-13 (1941), which

identified the other functions). Those four functions are:

- Evidentiary – the will provides permanent and reliable evidence of the testator's intent.
- Channeling – the testator's intent is expressed in a way that is understood by those who will interpret it so that the courts and personal representatives can process the will efficiently and without litigation.
- Ritual (cautionary) – the testator has a serious intent to dispose of property in the way indicated and the instrument is in final form and not a draft.
- Protective – the testator has capacity and is protected from undue influence, fraud, delusion and coercion. The instrument is not the product of forgery or perjury.

**Electronic Execution of Estate Planning Documents.** In commercial and other contexts not involving a will, the Uniform Electronic Transactions Act (1999) (UETA) validates the use of electronic signatures. UETA§ 7(a). However, UETA contains an express exception for wills and testamentary trusts, making the E-Wills Act necessary if a legislature wants to permit electronic wills. UETA§ 3(b). As of 2019, all but three states have adopted UETA, with most of the enactments occurring in 2000 and 2001. The federal Electronic Signatures in Global and National Commerce Act (E-SIGN) includes a similar exception. 15 U.S.C. 7003(a)(1).

Many documents authorizing nonprobate transfers of property are already executed electronically, and property owners have become accustomed to being able to use electronic beneficiary designations in connection with various will substitutes. The idea of permitting an electronic designation to control the transfer of property at death is already well accepted.

## UNIFORM ELECTRONIC WILLS ACT

**SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Electronic Wills Act.

**SECTION 2. DEFINITIONS.** In this [act]:

(1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

[(2) "Electronic presence" means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.]

(3) "Electronic will" means a will executed electronically in compliance with Section 5(a).

(4) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(5) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to affix to or logically associate with the record an electronic symbol or process.

(6) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(7) "Will" includes a codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate

succession.

***Legislative Note:*** *A state that permits an electronic will only if executed with the witnesses in the physical presence of the testator should omit paragraph (2) and renumber the remaining paragraphs accordingly. See also the Legislative Note to Section 5.*

**Comment**

**Paragraph 2. Electronic Presence.** An electronic will may be executed with the testator and all of the necessary witnesses present in one physical location. In that case the state's rules concerning presence for non-electronic wills, which may require line-of-sight presence or conscious presence, will apply. *See* Section 3. Because the E-Wills Act does not provide a separate definition of physical presence, a state's existing rules for presence will apply to determine physical presence.

An electronic will is also valid if the witnesses are in the electronic presence of the testator, *see* Section 5. This definition provides for the meaning of electronic presence. Permitting electronic presence will make it easier for testators in remote locations and testators with limited mobility to execute their wills. The witnesses and testator must be able to communicate in "real time," a term that means "the actual time during which something takes place." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/real%20time (last visited Sept. 22, 2019). The term is used in connection with electronic communication to mean that the people communicating do so without a delay in the exchange of information. For statutes using the term "real-time," see, e.g., CONN. GEN. STAT. ANN. § 16A-47b (2019) (real-time energy reports); COLO. REV. STAT. ANN. § 24-33.5-2102 (2019) ("communicate in real-time during an incident"); FLA. STAT. ANN. § 117.201(2) (2019) (in definition of "audio-visual communication technology" for online notarizations); ILL. STAT. ch. 220 § 5/16-107 (2019) (real-time pricing for utilities).

In the definition of electronic presence, "to the same extent" includes accommodations for people who are differently-abled. The definition does not provide specific accommodations due to the concern that any attempt at specificity would be too restrictive and to allow the standards to keep current with future advances in technology.

**Paragraph 5. Sign**. The term "logically associated" is used in the definition of sign, without further definition. Although Indiana has defined the term in its electronic wills statute, IND. CODE § 29-1-21-3(13) (defining logically associated as meaning that documents are "electronically connected, cross referenced, or linked in a reliable manner"), most statutes do not define the term. Most notably, the Uniform Electronic Transactions Act and the Revised Uniform Law on Notarial Acts (RULONA) use the term without defining it, due to the concern that an attempt at definition would be over- or under-inclusive as technology develops. Although often used in connection with a signature, the term is used in RULONA and in the E-Wills Act to refer both to a document that may be logically associated with another document as well as to a signature logically associated with a document. *See also* Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 *et seq*.

**Paragraph 7. Will.** The E-Wills Act follows the Uniform Probate Code (UPC) in providing that the term "will" includes instruments that may not involve the disposition of property. The common law definition of "will" is well established, and a definition in the E-Wills Act might result in inadvertent changes to the common law understanding.

**SECTION 3. LAW APPLICABLE TO ELECTRONIC WILL; PRINCIPLES OF EQUITY.** An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this [act].

**Comment**

The first sentence of this Section is didactic, and emphatically ensures that an electronic will is treated as a traditional one for all purposes.

In this Section "law" means both common law and statutory law. Law other than the E-Wills Act continues to supply rules related to wills, unless the E-Wills Act modifies a state's other law related to wills.

The common law requires that a testator intend that the writing be the testator's will. The Restatement explains, "To be a will, the document must be executed by the decedent with testamentary intent, i.e., the decedent must intend the document to be a will or to become operative at the decedent's death." RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (g) (1999).

A number of protective doctrines attempt to ensure that a document being probated as a will reflects the intent of the testator. Wills statutes typically include capacity requirements related to mental capacity and age. A minor cannot execute a valid will. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 8.1 (mental capacity), § 8.2 (age) (2003). Other requirements for validity may be left to the common law. A writing that appears to be a will may be challenged based on allegations of undue influence, duress, or fraud. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 8.3 (Undue Influence, Duress, or Fraud) (2003). The statutory and common law requirements that apply to wills in general also apply to electronic wills.

Laws related to qualifications to serve as a witness also apply to electronic wills. For some of those requirements *see, e.g.*, UPC § 2-505.

**SECTION 4. CHOICE OF LAW REGARDING EXECUTION.** A will executed electronically but not in compliance with Section 5(a) is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is:

(1) physically located when the will is signed; or

(2) domiciled or resides when the will is signed or when the testator dies.

**Comment**

Under the common law, the execution requirements for a will depended on the situs of real property, as to the real property, and the domicile of the testator, for personal property. *See* RESTATEMENT (SECOND) OF PROPERTY: WILLS & DON. TRANS. § 33.1, comment (b) (1992). The statutes of many states now treat as valid a will that was validly executed under the law of the state where the will was executed or where the testator was domiciled. For example, UPC § 2-506 states that a will is validly executed if executed according to "the law at the time of execution of the place where the will is executed, or of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national." For a non-electronic will, the testator will necessarily be in the state where the will is executed. Many state statutes also permit the law of the testator's domicile when the testator dies to apply. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (e) (1999).

Some of the state statutes permitting electronic wills treat an electronic will as executed in the state and valid under the state law even if the testator is not physically in the state at the time of execution. *See, e.g.,* NEV. REV. STAT. 133.088(1)(e) (2019) (stating that "the document shall be deemed to be executed in this State" if certain requirements are met, even if the testator is not within the state). Thus, someone domiciled and living outside Nevada could execute a Nevada will without leaving home. The Uniform Law Commission concluded that a state should not be required to accept an electronic will as valid if the state's domiciliary executed the will without being physically present in the state authorizing electronic wills.

Section 4 reflects the policy that a will valid where the testator was physically located should be given effect using the law of the state where executed. The E-Wills Act does not require a state to give effect to a will executed by a testator using the law of another state unless the testator resides, is domiciled, or is physically present in the other state when the testator executes the will.

***Example:*** Gina lived in Connecticut and was domiciled there. During a trip to Nevada Gina executes an electronic will, following the requirements of Nevada law. The will is valid in Nevada and also in Connecticut, because Gina was physically present in a state that authorizes electronic wills when she executed her will. Now assume that Gina never leaves the state of Connecticut. While at home she goes online, prepares a will, and executes it electronically using Nevada law. The will is valid in Nevada but not in Connecticut, unless Connecticut adopts the E-Wills Act.

This rule is consistent with current law for non-electronic wills. The rule is necessary, because otherwise someone living in a state that authorizes electronic wills might execute a will there and then move to a state that does not authorize electronic wills and be forced to make a new will or die intestate if unable or unwilling to execute another will. An electronic will executed in compliance with the law of the state where the testator was physically located should

be given effect, even if the testator later moves to another state, just as a non-electronic will would be given effect. A rule that would invalidate a will properly executed under the law of the state where the testator was physically present at the time of execution, especially if the testator was domiciled there, could trap an unwary testator and result in intestacy.

***Example***: Dennis lived in Nevada for 20 years. He met with a lawyer to have a will prepared, and when the will was ready for execution his lawyer suggested executing the will from his house, using the lawyer's electronic platform. Dennis executed the will in compliance with Nevada law in force at the time of execution, using the lawyer's electronic platform and providing the required identification. The lawyer had no concerns about Dennis's capacity and no worries that someone was unduly influencing him. Two years later Dennis moved to Connecticut where his daughter lived. Dennis died in Connecticut, with the Nevada will as his last valid will. Connecticut should give effect to Dennis's will, regardless of whether its execution would have otherwise been valid under Connecticut law.

**SECTION 5. EXECUTION OF ELECTRONIC WILL.**

(a) Subject to Section 8(d)[and except as provided in Section 6], an electronic will must be:

(1) a record that is readable as text at the time of signing under paragraph (2);

(2) signed by:

(A) the testator; or

(B) another individual in the testator's name, in the testator's physical presence and by the testator's direction; and

(3) [either:

(A)] signed in the physical [or electronic] presence of the testator by at least two individuals[, each of whom is a resident of a state and physically located in a state at the time of signing and] within a reasonable time after witnessing:

[(A)] [(i)] the signing of the will under paragraph (2); or

[(B)] [(ii)] the testator's acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will[; or

(B) acknowledged by the testator before and in the physical [or electronic]

presence of a notary public or other individual authorized by law to notarize records electronically].

(b) Intent of a testator that the record under subsection (a)(1) be the testator's electronic will may be established by extrinsic evidence.

***Legislative Note:*** *A state should conform Section 5 to its will-execution statute.*

*A state that enacts Section 6 (harmless error) should include the bracketed language at the beginning of subsection (a).*

*A state that permits an electronic will only when the testator and witnesses are in the same physical location, and therefore prohibits remote attestation, should omit the bracketed words "or electronic" from subsection (a)(3) and Section 8(c).*

*A state that has enacted Uniform Probate Code Section 2-502 or otherwise validates an unattested but notarized will should include subsection (a)(3)(B).*

**Comment**

The E-Wills Act does not duplicate all rules related to valid wills, and except as otherwise provided in the E-Wills Act, a state's existing requirements for valid wills will apply to electronic wills. Section 5 follows the formalities required in UPC § 2-502. A state with different formalities should modify this Section to conform to its requirements. Under Section 5 an electronic will can be valid if executed electronically, even if the testator and witnesses are in different locations.

Some states allow a will to be self-proved if the testator and witnesses sign an affidavit detailing the procedures followed in executing the will. The UPC treats the self-proving affidavit as creating a conclusive presumption that the signature requirements were met and a rebuttable presumption that other requirements for a valid will were met. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (r) (1999). Rather than create extra requirements to validate an electronic will, the E-Wills Act creates extra requirements to make an electronic will self-proving when the testator and witnesses are in different locations. *See* Section 8.

**Requirement of a Writing.** Statutes that apply to non-electronic wills require that a will be "in writing." The RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment i (1999), explains:

> *i. The writing requirement.* All the statutes, including the original and revised versions of the Uniform Probate Code, require a will to be in writing. The requirement of a writing does not require that the will be written on sheets of paper, but it does require a medium that allows the markings to be detected. A will, for example, scratched in the

paint on the fender of a car would be in writing, but one "written" by waving a finger in the air would not be.

UPC § 2-502 requires that a will be "in writing" and the comment to that section says, "Any reasonably permanent record is sufficient." The E-Wills Act requires that the provisions of an electronic will be readable as text (and not as computer code, for example) at the time the testator executed the will. The E-Wills Act incorporates the requirement of writing by requiring that an electronic will be readable as text.

One example of an electronic record readable as text is a will inscribed with a stylus on a tablet. *See In re Estate of Javier Castro*, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013). An electronic will may also be a word processing document that exists on a computer or a cell phone but has not been printed. Under the E-Wills Act, the issue for these wills is not whether a writing exists but whether the testator signed the will and the witnesses attested it.

The Uniform Law Commission decided to retain the requirement that a will be in writing. Thus, the E-Wills Act does not permit an audio or audio-visual recording of an individual describing the individual's testamentary wishes to constitute a will. However, an audio-visual recording of the execution of a will may provide valuable evidence concerning the validity of the will.

The use of a voice activated computer program can create text that can meet the requirements of a will. For example, a testator could dictate the will to a computer using voice recognition software. If the computer converts the spoken words to text *before* the testator executes the will, the will meets that requirement that it be a record readable as text at the time of execution.

**Electronic Signature.** In *Castro*, the testator signed his name as an electronic image using a stylus. A signature in this form is a signature for purposes of the E-Wills Act. The definition of "sign" includes a "tangible symbol" or an "electronic symbol or process" made with the intent to authenticate the record being signed. Thus, a typed signature would be sufficient if typed with the intent that it be a signature. A signature typed in a cursive font or a pasted electronic copy of a signature would also be sufficient, if made with the intent that it be a signature. As e-signing develops, other types of symbols or processes may be used, with the important element being that the testator intended the action taken to be a signature validating the electronic will.

**Requirement of Witnesses.** Wills law includes a witness requirement for several reasons: (1) evidentiary—to identify persons who can answer questions about the voluntariness and coherence of the testator and whether undue influence played a role in the creation and execution of the will, (2) cautionary—to signal to the testator that signing the document has serious consequences, and (3) protective—to deter coercion, fraud, duress, and undue influence. Section 5 requires witnesses for a validly executed will.

Will substitutes—tools authorizing nonprobate transfers—typically do not require witnesses, and a testator acting without legal assistance may not realize that witnesses are necessary for an electronic will. The harmless error doctrine has been used to give effect to an electronic will executed without witnesses when the testator's intent was clear. In the electronic will context these cases have typically involved suicides that occurred shortly after the creation of the electronic document. *See, e.g., In re Estate of Horton*, 925 N.W. 2d 207, 325 Mich.App. 325 (2018). A state concerned that electronic wills will be invalidated due to lack of witnesses should consider adopting the harmless error provision in Section 6 of the E-Wills Act, even if the state has not adopted a similar provision for judicially correcting harmless error in execution.

**Remote Witnesses.** Because electronic wills may be executed via the internet, the question arises whether the witnesses to the testator's signature must be in the physical presence of the testator or whether electronic presence such as via a webcam and microphone will suffice. Some online providers of wills offer remote witnessing as a service. The E-Wills Act does not include additional requirements for electronic wills executed with remote witnesses, but Section 8 imposes additional requirements before a will executed with remote witnesses can be considered self-proving.

The usefulness of witnesses who can testify about the testator's apparent state of mind if a will is challenged for lack of capacity or undue influence may be limited, because a witness who observes the testator sign the will may not have sufficient contact with the testator to have knowledge of capacity or undue influence. This is true whether the witnesses are in the physical or electronic presence of the testator. Nonetheless, the current legal standards and procedures address the situation adequately and remote attestation should not create significant new evidentiary burdens. The E-Wills Act errs on the side of not creating hurdles that result in denying probate to wills that represent the intent of their testators.

**Reasonable Time.** The witnesses must sign within a reasonable time after witnessing the testator sign or acknowledge the signing or the will. The Comment to UPC § 2-502 notes that the statute does not require that the witness sign before the testator dies, but some cases have held that signing after the testator's death is not "within a reasonable time." In *Matter of Estate of Royal*, 826 P. 2d 1236 (1992), the Supreme Court of Colorado held that attestation must occur before the testator's death, citing cases in several states that had reached the same result. Other cases have held a will valid even though a witness signed after the testator's death. *See, e.g*., In re Estate of Miller, 149 P.3d 840 (Idaho 2006). For electronic wills, a state's rules applicable to non-electronic wills apply.

**Notarized Wills.** A small number of states permit a notary public to validate the execution of a will in lieu of witnesses. Paragraph (3)(b) follows UPC § 2-502(a)(3)(B) and provides that a will can be validated if the testator acknowledges the will before a notary, even if the will is not attested by two witnesses. Because remote online notarization includes protection against tampering, other states may want to include the option for the benefit of additional security.

**[SECTION 6. HARMLESS ERROR.**

**Alternative A**

A record readable as text not executed in compliance with Section 5(a) is deemed to comply with Section 5(a) if the proponent of the record establishes by clear-and-convincing evidence that the decedent intended the record to be:

(1) the decedent's will;

(2) a partial or complete revocation of the decedent's will;

(3) an addition to or modification of the decedent's will; or

(4) a partial or complete revival of the decedent's formerly revoked will or part of the will.

**Alternative B**

[Cite to Section 2-503 of the Uniform Probate Code or comparable provision of the law of this state] applies to a will executed electronically.

**End of Alternatives]**

***Legislative Note:*** *A state that has enacted Uniform Probate Code Section 2-503 or another harmless error rule for a non-electronic will, should enact Alternative B. A state that has not enacted a harmless error rule may not want to add a harmless error rule solely for an electronic will, but if it does, it should enact Alternative A.*

**Comment**

The harmless error doctrine was added to the UPC in 1990. Since then 11 states have adopted the rule. The Comments to UPC § 2-503 describe the development of the doctrine in Australia, Canada, and Israel, and cite to a number of studies and articles. *See, also*, RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS § 3.3 (1999); John H. Langbein, *Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion* 38 ADEL. L. REV. 1 (2017); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987).

The focus of the harmless error doctrine is the testator's intent. A court can excuse a defect in the execution formalities if the proponent of the defective will can establish by clear

and convincing evidence that the testator intended the writing to be the testator's will. The will formalities serve as proxies for testamentary intent, and harmless error doctrine replaces strict compliance with the formalities with direct evidence of that intent.

The harmless error doctrine may be particularly important in connection with electronic wills because a testator executing an electronic will without legal assistance may assume that an electronic will is valid even if not witnessed. The high standard of proof that the testator intended the writing to serve as will should protect against abuse.

A number of cases both in the United States and in Australia have involved electronic wills written shortly before the testator committed suicide. The circumstances surrounding the writing have led the courts in those cases to use harmless error to validate the wills, despite the lack of witnesses. *See In re Estate of Horton*, 925 N.W. 2d 207 (Mich. 2018) (involving an electronic document titled "Last Note"); *In re Yu*, [2013] QSC 322 (Queensland Sup. Ct.) (involving a document written on an iPhone and beginning, "This is the Last Will and Testament…").

Although in these cases the wills have been given effect, a will drafted in contemplation of suicide may be subject to challenge based on concerns about capacity. Even if a state adopts the harmless error doctrine, the other requirements for a valid will, including testamentary capacity and a lack of undue influence, will apply.

**SECTION 7. REVOCATION.**

(a) An electronic will may revoke all or part of a previous will.

(b) All or part of an electronic will is revoked by:

(1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or

(2) a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator's physical presence.

**Comment**

Revocation by physical act is permitted for non-electronic wills. The difficulty with physical revocation of an electronic will is that multiple copies of an electronic will may exist. Although a subsequent will may revoke an electronic will, a testator may assume that a will may be deleted by using a delete or trash function on a computer, as well as by other physical means. Guided by the goal of giving effect to the intent of most testators, the E-Wills Act permits revocation by physical act.

Although a will may be revoked by physical act, revocation by subsequent will under subsection (a)(1) is the preferred, and more reliable, method of revocation. The lack of a certain outcome when revocation by physical act is used makes this form of revocation problematic.

**Physical Act Revocation.** The E-Wills Act does not define physical act, which could include deleting a file with the click of a mouse or smashing a flash drive with a hammer. If an electronic will is stored with a third party that provides a designated mechanism for revocation, such as a delete button, and the testator intentionally pushes the button, the testator has used a physical act. If a testator prints a copy of an electronic will, writing "revoked" on the copy would be a physical act. Typing "revoked" on an electronic copy would also constitute a physical act, if the electronic will had not been notarized in a manner that locked the document.

Sending an email that says, "I revoke my will," is not a physical act performed on the will itself because the email is separate from the will. The email could revoke the will under subsection (a)(1) as a subsequent will, if the email met the formalities required under Section 5(a) or met the burden of proof under Section 6. Of course, if there were a separate physical act, such as deleting an electronic will on an electronic device, such an email could be useful evidence in interpreting the testator's intent.

If a testator uses a physical act to revoke an electronic will, the party arguing that the testator intended to revoke the will must prove the testator's intent.

**Multiple Originals.** Although multiple copies of an electronic will may exist, a physical act performed on one of them by the testator with the intent to revoke will be sufficient to revoke the will. Traditional law applicable to duplicate originals supports this rule. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1, comment f, ¶ 2 (1999) is illustrative:

> If the testator executed more than one copy of the same will, each duplicate is considered to be the testator's will. The will is revoked if the testator, with intent to revoke, performs a revocatory act on one of the duplicates. The testator need not perform a revocatory act on all the duplicates.

**Intent to Revoke.** Revocation by physical act requires that the testator intend to revoke the will. The E-Wills Act uses a preponderance of the evidence standard, which may be more likely to give effect to the intent of testators with electronic wills than would a clear and convincing evidence standard. A testator might assume that by deleting a document the testator has revoked it, and a higher evidentiary standard could give effect to wills that testators intended to revoke. The standard may increase the risk of a false positive but should decrease the risk of a false negative. The preponderance of the evidence standard is consistent with the law for non-electronic wills. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1 (1999).

*Example:* Alejandro executes a will electronically, using a service that provides witnesses and a notary. A year later Alejandro decides to revoke the will, but he is not ready to make a new will. He goes to the website of the company that is storing his will, enters his login information, and gets to a page that gives him the option to revoke the will by pressing a button labeled revoke. He affirms the decision when a pop-up screen asks if he is certain he wants to revoke his

will. When Alejandro dies, his sister (the beneficiary of the electronic will) produces a copy he had sent her. The company provides information indicating that he had revoked the will, following the company's protocol to revoke a will. The evidence is sufficient to establish that Alejandro intended to revoke his will, and under the E-Wills Act Alejandro's compliance with the company's protocol would qualify as a physical act revocation. His sister will be unsuccessful in her attempt to probate the copy she has.

*Example:* Yvette writes a will on her electronic tablet and executes it electronically, with two neighbors serving as witnesses. She saves a copy on her home computer. The will gives her estate to her nephew. Some years later Yvette decides she would prefer for her estate to be divided by her two intestate heirs, the nephew and a niece. Yvette deletes the will file on her computer, forgetting that she had given her tablet, which still has the will on it, to her nephew. She deleted the file with the intent to revoke her will, and she tells one of the witnesses as well as her niece that she has done so. When she dies her nephew produces the tablet and asserts that the will is her valid will. Her niece and the witness can testify that Yvette intended to revoke her will by the physical act of deleting the duplicate original on her computer. Under the E-Wills Act, a court could reasonably conclude that a preponderance of the evidence supports a finding of a physical act revocation. If the will on the computer had been deleted but the only person who could testify about Yvette's intent was the niece, the court might conclude that the niece's self-interest made her testimony less persuasive. The evidence in that case might not meet the preponderance of the evidence standard, especially if the niece had access to Yvette's computer.

**Lost Wills**. A testator's accidental deletion of an electronic will should not be considered revocation of the will. However, the common law "lost will" presumption may apply. Under the common law, if a will last known to be in the possession of the testator cannot be found at the testator's death, a presumption of revocation may apply. The soft presumption is that the testator destroyed the will with the intent to revoke it. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1, comment j (1999). The presumption can be overcome with extrinsic evidence that provides another explanation for the will's disappearance. A house fire might have destroyed the testator's files. A testator may have misplaced or inadvertently discarded files; age or poor health may make such inadvertence more likely. A person with motive to revoke and access to the testator's files might have destroyed the will. The presumption does not apply if the will was in the possession of someone other than the testator.

If the document cannot be found and the presumption of revocation is overcome or does not apply, the contents of the will can be proved through a copy or testimony of the person who drafted the will.

**Physical Act by Someone Other than Testator.** A testator may direct someone else to perform a physical act on a will for the purpose of revoking it. The testator must be in the physical presence of the person performing the act, not merely in the person's electronic presence. The use of "physical presence" is intended to mean that the state's rules on presence in connection with wills apply—either line of sight or conscious presence. UPC § 2-507(a)(2) relies on conscious presence.

**SECTION 8. ELECTRONIC WILL ATTESTED AND MADE SELF-PROVING AT TIME OF EXECUTION.**

(a) An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses.

(b) The acknowledgment and affidavits under subsection (a) must be:

(1) made before an officer authorized to administer oaths under law of the state in which execution occurs [or, if fewer than two attesting witnesses are physically present in the same location as the testator at the time of signing under Section 5(a)(2), before an officer authorized under [cite to Revised Uniform Law on Notarial Acts Section 14A (2018) or comparable provision of the law of this state]]; and

(2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will.

(c) The acknowledgment and affidavits under subsection (a) must be in substantially the following form:

I, _____, the testator, and, being sworn, declare to the
(name)

undersigned officer that I sign this instrument as my electronic will, I willingly sign it or willingly direct another individual to sign it for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am [18] years of age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

We, _____ and _____,
(name) (name)

witnesses, being sworn, declare to the undersigned officer that the testator signed this instrument

as the testator's electronic will, that the testator willingly signed it or willingly directed another individual to sign for the testator, and that each of us, in the physical [or electronic] presence of the testator, signs this instrument as witness to the testator's signing, and to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

Certificate of officer:

State of _____

[County] of _____

Subscribed, sworn to, and acknowledged before me by _____,
(name)

the testator, and subscribed and sworn to before me by _____ and
(name)

_____, witnesses, this _____ day of _____, ___.
(name)

(Seal)

_____
(Signed)

_____
(Capacity of officer)

(d) A signature physically or electronically affixed to an affidavit that is affixed to or logically associated with an electronic will under this [act] is deemed a signature of the electronic will under Section 5(a).

***Legislative Note:*** *A state that has not enacted the Uniform Probate Code should conform Section 8 to its self-proving affidavit statute. The statements that the requirements for a valid will are met and the language required for the notary's certification should conform with the requirements under state law.*

*A state that has authorized remote online notarization by enacting the 2018 version of the Revised Uniform Law on Notarial Acts should cite to Section 14A of that act in subsection (b)(1). A state that has adopted a non-uniform law allowing remote online notarization should cite to the relevant section of state law in subsection (b)(1).*

*A state that does not permit an electronic will to be executed without all witnesses being physically present should omit the bracketed language in subsection (b)(1) and the words "or electronic" in subsection (c) and Section 5(a)(3).*

**Comment**

If an officer authorized to administer oaths (a notary) is in a state that has adopted Section 14A of RULONA or a comparable statute, the notary need not be physically present. However, if the state has not adopted a statute allowing remote online notarization, the notary must be physically present in order to administer the oath under the law of that state.

**Remote Online Notarization.** Section 14A of RULONA provides additional protection through a notarization process referred to as "remote online notarization." In remote online notarization, the person signing a document appears before a notary using audio-video technology. Depending on state law, the document can be paper or digital, but the signer and the notary are in two different places. Extra security measures are taken to establish the signer's identity.

The E-Wills Act requires additional steps to make an electronic will with remote attestation self-proving. If the testator and necessary witnesses are in the same physical location, the will can be made self-proving using a notary who can notarize an electronic document but who is not authorized to use remote online notarization. However, if anyone necessary to the execution of the will is not in the same physical location as the testator, the will can be made self-proving only if remote online notarization is used.

**Signatures on Affidavit Used to Execute Will.** Subsection [(d)] addresses the problem that arises when a testator and witnesses sign an affidavit, mistakenly thinking they are signing the will itself. UPC § 2-504(c) incorporated this provision into the UPC in 1990 to counteract judicial interpretations in some states that had invalidated wills where this mistake had occurred.

**Time of Affidavit.** Under the UPC a will may be made self-proving at a time later than execution. The E-Wills Act does not permit the execution of a self-proving affidavit for an electronic will other than at the time of execution of the electronic will. An electronic will has metadata that will show the date of execution, and if an affidavit is logically associated with an electronic will at a later date, the date of the electronic will and the protection provided by the

self-proving affidavit may be uncertain. If a testator fails to make an electronic will self-proving simultaneously with the will's execution, the testator can later re-execute the electronic will. The additional burden on the testator is justified given the possible confusion and loss of protection that could result from a later completion of an affidavit.

**SECTION 9. CERTIFICATION OF PAPER COPY.** An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will is made self-proving, the certified paper copy of the will must include the self-proving affidavits.

***Legislative Note:*** *A state may need to change its probate court rules to expand the definition of what may be filed with the court to include electronic filings.*

*Court procedural rules may require that a certified paper copy be filed within a prescribed number of days of the filing of the application for probate. A state may want to include procedural rules specifically for electronic wills.*

**SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**SECTION 11. TRANSITIONAL PROVISION.** This [act] applies to the will of a decedent who dies on or after [the effective date of this [act]].

**Comment**

An electronic will may be valid even if executed before the effective date of the E-Wills Act, if it meets the E-Wills Act's requirements and the testator dies on or after the effective date.

**SECTION 12. EFFECTIVE DATE.** This [act] takes effect . . . .